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SENATE

REPORT
No. 96-179

ARCHAEOLOGICAL RESOURCES PROTECTION ACT OF 1979

MAY 15 (legislative day, APRIL 9), 1979.—Ordered to be printed

Mr. BUMPERS, from the Committee on Energy and Natural Resources, submitted the following

REPORT

[To accompany S. 490]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 490) a bill to protect archeological resources owned by the United States, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

The amendments are as follows:

1. Strike out all after the enacting clause and insert in lieu thereof the following:

SHORT TITLE AND TABLE OF CONTENTS

SECTION 1. This Act may be cited as the "Archaeological Resources Protection Act of 1979".

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FINDINGS AND PURPOSE

SEC. 2. (a) The Congress finds that—

(1) archaeological resources on public lands and Indian lands are an accessible and irreplaceable part of the Nation's heritage;

(2) these resources are increasingly endangered because of their commercial attractiveness; and

(3) existing Federal laws do not provide adequate protection to prevent the loss and destruction of these archaeological resources and sites resulting from uncontrolled excavations and pillage.

(b) The purpose of this Act is to protect, for the present and future benefit of the American people, the archaeological resources and sites which are on public lands and Indian lands.

DEFINITIONS

SEC. 3. As used in this Act—

(a) The term "archaeological resource" means any material remains of past human life or activities which are of archaeological interest, as determined under uniform regulations promulgated pursuant to this Act. Such archaeological resources shall include, but not be limited to: pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, nonfossilized and fossilized paleontological specimens when found in an archaeological context, and any portion or piece of any of the foregoing items. No item shall be treated as an archaeological resource under regulations under this paragraph unless such item is at least fifty years of age.

(b) The term "Federal land manager" means, with respect to any public lands, the Secretary of the department, or the head of any other agency or instrumentality of the United States, having primary management authority over such lands. In the case of any public lands or Indian lands with respect to which no department, agency, or instrumentality has primary management authority, such term means the Secretary of the Interior. If the Secretary of the Interior consents, the responsibilities (in whole or in part) under this Act of the Secretary of any department (other than the Department of the Interior) or the head of any other agency or instrumentality may be delegated to the Secretary of the Interior with respect to any land managed by such other Secretary or agency head, and in any such case, the term "Federal land manager" means the Secretary of the Interior.

(c) The term "public lands" means—

(1) lands or interests in lands which are administered as part of—

(A) the National Park System,

(B) the National Wildlife Refuge System, or

(C) the National Forest System; and

(2) all other lands the fee title to which is held by the United States other than lands on the Outer Continental Shelf;

(d) The term "Indian lands" means lands of Indian tribes, or Indian individuals, which are either held in trust by the United States or subject to a restriction against alienation imposed by the United States.

(e) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in, or established pursuant to, the Alaska Native Claims Settlement Act (85 Stat. 688).

(f) The term "person" means an individual, corporation, partnership, trust, institution, association, or any other private entity or any officer, employee, agent, department, or instrumentality of the United States, of an Indian tribe or of any State or political subdivision thereof.

(g) The term "State" means any of the fifty States, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands.

EXCAVATION AND REMOVAL

SEC. 4. (a) Any person may apply to the Federal land manager for a permit to excavate or remove any archaeological resource located on public lands or Indian lands and to carry out activities associated with such excavation or removal. The application shall be required, under uniform regulations under this Act, to contain such information as the Federal land manager deems necessary, including information concerning the time, scope, and location and specific purpose of the proposed work.

(b) A permit may be issued pursuant to an appliaiton under subsection (a) if the Federal land manager determines, pursuant to uniform regulations under this Act, that—

(1) the applicant is qualified to carry out the permitted activity;

(2) the activity is undertaken for the purpose of furthering archaeological knowledge in the public interests;

(3) the archaeological resources derived from public lands will remain the property of the United States, and such resources and copies of associated archaeological records and data will be preserved by a suitable university, museum, or other scientific or educational institution; and

(4) the activity pursuant to such permit is not inconsistent with any management plan applicable to the public lands concerned.

(c) If a permit issued under this section may result in harm to, or destruction of, any religious or cultural site, as determined by the Secretary of the Interior, before issuing such permit the Secretary shall notify any Indian tribe which may consider the site as having religious or cultural importance. Such notice shall not be deemed a disclosure to the public for purposes of section 10.

(d) Any permit under this section shall contain such terms and conditions, pursuant to uniform regulations promulgated under this Act, as the Federal land manager concerned deems necessary to carry out the purposes of this Act, to insure compliance with other applicable provisions of law, and to protect other resources involved.

(e) Each permit under this section shall identify the individual who shall be responsible for carrying out the terms and conditions of the permit and for otherwise complying with this Act and other law applicable to the permitted activity.

(f) Any permit issued under this section may be suspended by the Federal land manager upon his determination that the permittee has violated any provision of section 6, or the terms and conditions of the permit. Any such permit may be revoked by such Federal land manager upon assessment of a civil penalty under section 7(a) against the permittee or upon the permittee's conviction under section 7(b).

(g)(1) No permit shall be required under this section or under the Act of June 8, 1906 (16 U.S.C. 431) for the excavation or removal by any Indian tribe or member thereof of any archaeological resource located on Indian lands of such Indian tribe: *Provided*, That, in the absence of tribal law regulating the excavation or removal of archaeological resources on Indian lands, an individual tribal member shall be required to obtain a permit under this section or under the Act of June 8, 1906 (16 U.S.C. 431).

(2) In the case of any permits for the excavation or removal of any archaeological resource located on Indian lands, the permit may be granted only after obtaining the consent of the Indian or Indian tribe owning such lands. The permit shall include such terms and conditions as may be requested by such Indian or Indian tribe.

(h)(1) No permit or other permission shall be required under the Act of June 8, 1906 (16 U.S.C. 431–433) for any activity for which a permit is issued under this section.

(2) Any permit issued under the Act of June 8, 1906, shall remain in effect according to its terms and conditions following the enactment of this Act. No permit under this Act shall be required to carry out any activity under a permit issued under the Act of June 8, 1906, before the date of the enactment of this Act which remains in effect as provided in this paragraph, and nothing in this Act shall modify or affect any such permit.

(i) Issuance of a permit in accordance with this section and applicable regulations shall not require compliance with section 106 of the Act of October 15, 1966 (80 Stat. 917, 16 U.S.C. 470f).

CUSTODY OF RESOURCES

SEC. 5. The Secretary of the Interior may promulgate regulations providing for—

(a) the exchange, where appropriate, between suitable universities, museums, or other scientific or educational institutions, of archaeological resources removed from public lands and, with the consent of the Indian or Indian tribe, Indian lands pursuant to this Act, and

(b) the ultimate disposition of such resources and other resources removed pursuant to the Act of June 27, 1960 (16 U.S.C. 469–469c) or the Act of June 8, 1906 (16 U.S.C. 431–433).

Following promulgation of regulations under this section, notwithstanding any other provision of law, such regulations shall govern the disposition of archaeological resources removed from public lands and Indian lands pursuant to this Act.

PROHIBITED ACTS

SEC. 6 (a) No person may excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or Indian lands unless such activity is pursuant to a permit issued under section 4, a permit referred to in section 4(h)(2), or the exemption contained in section 4(g)(1).

(b) No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange any archaeological resource if such resource was excavated or removed from public lands or Indian lands in violation of—

(1) the prohibition contained in subsection (a); or

(2) any provision, rule, regulation, ordinance, or permit in effect under any other provision of Federal law.

(c) No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange, in interstate or foreign commerce, any archaeological resource excavated, removed, sold, purchased, exchanged, transported, or received in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law.

(d) The prohibitions contained in this section shall take effect on the date of the enactment of this Act.

PENALTIES

SEC. 7. (a)(1) Any person who violates any prohibition contained in a regulation or permit issued under this Act may be assessed a civil penalty by the Federal land manager concerned. No penalty may be assessed under the subsection unless such person is given notice and opportunity for a hearing with respect to such violation. Each violation shall be a separate offense. Any such civil penalty may be remitted or mitigated by the Federal land manager concerned.

(2) The amount of such penalty shall be determined under regulations promulgated pursuant to this Act, taking into account—

(A) the archaeological or commercial value of the archaeological resource involved; and

(B) the cost of restoration and repair of the resource and the archaeological site involved. Such regulations shall provide that, in the case of a second or subsequent violation by any person, the amount of such civil penalty may be double the amount which would have been assessed if such violation were the first violation by such person.

The amount of any penalty assessed under this subsection shall not exceed $1,000 for each violation or $2,000 in the case of a second or subsequent violation.

(3) Any person aggrieved by an order assessing a civil penalty under paragraph (1) may file a petition for judicial review of such order with the United States District Court for the District of Columbia or for any other district in which such a person resides or transacts business. Such a petition may only be filed within the thirty-day period beginning on the date the order making such assessment was issued. The court shall hear such action on the record made before the Federal land manager and shall sustain his action if it is supported by substantial evidence on the record considered as a whole.

(4) If any person fails to pay an assessment of a civil penalty—

(A) after the order making the assessment has become a final order and such persons has not filed a petition for judicial review of the order in accordance with paragraph (3); or

(B) after a court in an action brought under paragraph (3) has entered a final judgment upholding the assessment of a civil penalty, the Federal land managers may request the Attorney General to institute a civil action in a district court of the United States for any district in which such person is found, resides, or transacts business to collect the penalty and such court shall have jurisdiction to hear and decide any such action. In such action, the validity and amount of such penalty shall not be subject to review.

(5) Hearings held during proceedings for the assessment of civil penalties authorized by paragraph (1) of this subsection shall be conducted in accordance with section 554 of title 5 of the United States Code. The Federal land manager may issue subpenas for the atendance and testimony of witnesses and the production of relevant papers, books, and documents, and administer oaths. Witnesses summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person pursuant to this paragraph, the district court of the United States for any district in which such person is found or

resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Federal land manager or to appear and produce documents before the Federal land manager, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b) Any person who knowingly violates, or solicits or employs any other person to violate, any prohibition contained in section 6 shall, upon conviction, be fined not more than $10,000 or imprisoned not more than one year, or both. If the commercial or archaeological value of the archaeological resources involved and the cost of restoration and repair of such resources exceeds the sum of $5,000, any person who knowingly violates, or solicits or employs any other person to violate, any prohibition contained in section 6 shall be fined not more than $20,000 or imprisoned not more than two years, or both. In the case of a second or subsequent violation under this subsection the penalty shall be $100,000, or five years, or both.

CIVIL DAMAGES

SEC. 8. (a) Any person who violates a prohibition contained in section 6 shall be liable to the United States for any damage to the archaeological resource involved and may be sued civilly in the United States district court for the district in which the resource is located.

(b) For purposes of this section, damages to an archaeological resource include—

(1) the archaeological value of the resource;

(2) the commercial value of the resource; and

(3) the cost of restoration and repair of the resource and the site involved.

REWARDS; FORFEITURE

SEC. 9. (a) Upon the certification of the Federal land manager concerned, the Secretary of the Treasury is directed to pay, from penalties and fines collected under section 7, an amount equal to one-half of such penalty or fine, but not to exceed $500, to any person who furnishes information which leads to the finding of civil violation or the conviction of criminal violation with respect to which such penalty or fine was paid. If several persons provided such information, such amount shall be divided among such persons. No officer or employee of the United States or of any State or local government who furnishes information or renders service in the performance of his official duties shall be eligible for payment under this subsection.

(b) All archaeological resources with respect to which a violation of section 6 occurred and which are in the possession of any person, and all vehicles and equipment of any person which were used in connection with such violation, may be (in the discretion of the court or administrative law judge, as the case may be) subject to forfeiture to the United States upon—

(1) such person's conviction of such violation under section 7(b);

(2) assessment of a civil penalty against such person under section 7(a) with respect to such violation; or

(3) a determination by any court that such archaeological resources, vehicles, or equipment were involved in such violation.

(c) In cases in which a violation of the prohibition contained in section 6 involve archaeological resources excavated or removed from Indian lands, the Federal land manager or the court, as the case may be, shall provide for the payment in an Indian or Indian tribe involved of all damages collected pursuant to section 8 and forfeitures under this section.

CONFIDENTALITY

SEC. 10. Information concerning the nature and location of any archaeological resource for which the excavation or removal requires a permit or other permission under this Act or under any other provision of Federal law may not be made available to the public under subchapter II of chapter 5 of title 5 of the United States Code or under any other provision of law unless the Federal land manager concerned determines that such disclosure would—

(a) further the purposes of this Act or the Act of June 27, 1960 (16 U.S.C. 469–469c); and

(b) not create a risk of harm to such resources or to the site at which such resources are located.

REGULATIONS; INTERGOVERNMENTAL COORDINATION

SEC. 11. (a) The Secretaries of the Interior, Agriculture, and Defense, after consultation with other Federal land manager, Indian tribes, and representatives of concerned State agencies, and after public notice and hearing, shall promulgate such uniform rules and regulations as may be appropriate to carry out the purposes of this Act. Such rules and regulations may be promulgated only after consideration of the provisions of the American Indian Religious Freedom Act (92 Stat. 469; 42 U.S.C. 1996).

(b) Each Federal land manager shall promulgate such rules and regulations, consistent with the uniform rules and regulations under subsection (a), as may be appropriate for the carrying out of his functions and authorities under this Act.

SAVINGS PROVISIONS; MINING; ROCK COLLECTION

SEC. 12. (a) Nothing in this Act shall be construed to repeal or modify the mining or mineral leasing laws of the United States.

(b) Nothing in this Act applies to, or requires a permit for, the collection for private purposes of any rock or mineral which is not an archaeological resource, as determined under uniform regulations promulgated pursuant to this Act.

REPORT

SEC. 13. As part of the annual report submitted to the Congress under section 5(c) of the Archaeological Recovery Act of 1960 (74 Stat. 220; 16 U.S.C. 469–469a), the Secretary of the Interior shall include a report to the Congress respecting the activities carried out under this Act.

2. Amend the title to read as follows:

A bill to protect archaeological resources on public lands and Indian lands, and for other purposes.

PURPOSE OF THE MEASURE

S. 490, as amended, would provide greater protection than now exists for archaeological resources on public lands and Indian lands of the United States. This protection would be accomplished by providing penalties commensurate with the value of the resource damaged or removed from public lands and/or Indian lands without a permit. In addition, information concerning the nature and location of any archaeological resource which might create a risk to such resource would be exempt under the Freedom of Information Act.

SUMMARY OF MAJOR PROVISIONS

Section 3 contains definitions of terms used in the Act. Of major importance is the definition for "archaeological resource" which was not defined by an earlier Act (Antiquities Act of 1906). This definition would cure the problem of unconstitutional vagueness, created by the lack of definition, found by the United States Court of Appeals for the Ninth Circuit. (*U.S.* v. *Diaz*, 449 F. 2d 113 (9th Cir. 1974).)

Section 5 provides for regulations which would allow for the exchange of archaeological resources removed from public lands and Indian lands between museums and other institutions and the disposition of such resources by the Secretary of the Interior.

Section 6 lists those activities which would be prohibited by this Act. The prohibited acts in this section would extend beyond existing law (Antiquities Act of 1906) to include persons who would deal in stolen artifacts.

Section 7 sets forth the penalties. Subsection (a) provides for civil penalties with a maximum fine of $1,000 for each violation or $2,000 for subsequent violations. Subsection (b) provides for criminal penalties for persons who knowingly violate the prohibitions contained in the Act.

Section 9 directs the Secretary of the Treasury, at the recommendation of the appropriate Federal agency, to pay up to one-half of the civil or criminal penalty not to exceed $500, to persons furnishing information leading to the finding of a civil violation or criminal conviction.

Section 10 provides a specific exemption from the Freedom of Information Act for the location of archaeological sites on public lands and Indian lands. It would place discretionary disclosure authority with the appropriate Federal agency.

BACKGROUND AND NEED

Archaeological resources of the United States have been protected since 1906 by the Antiquities Act (16 U.S.C. 431–433). Under that Act, persons convicted of excavating, removing, injuring or destroying any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the United States, without a permit, could be fined $500, imprisoned up to 90 days, or both.

Certain deficiencies in the existing law which have surfaced in recent years, prompted House and Senate Members to introduce separate legislation to deal with circumstances which were not contemplated by the 1906 Act.

In a recent decision, the United States Court of Appeals for the Ninth Circuit held that the 1906 Act was unconstitutional. The court held that the definitional portion of the Act was unconstitutionally vague, and that the Act, therefore, is unenforceable in the Ninth Circuit. The States affected by this decision are Arizona, California, Nevada, Oregon, Washington, Montana, Idaho, Alaska, Hawaii, and Guam.

The science of archaeology has changed significantly since the enactment of the Antiquities Act of 1906 when protection of artifacts, "the objects of antiquity" was the ultimate goal. With the current technology associated with archaeological excavation, the entire archaeological site provides a wide range of potential information about the past.

The increased number of incidents of illegal excavations on public lands and Indian lands for personal profit are leaving certain sites totally useless for any scientific investigations. The current excavation techniques involving destructive earth-moving differ greatly from the manual technique employed when the act was passed in 1906.

The current penalties for destruction or removal of archaeological resources, $500 fine, imprisonment for up to 90 days, or both, no longer serve as a deterrent to commercial looters who are able to market certain Indian pots for thousands of dollars. For many of the commercial looters, a $500 fine is considerd a cost of doing business.

LEGISLATIVE HISTORY

S. 490 was introduced on February 26, 1979 by Senators Domenici, Schmitt, DeConcini, Goldwater, and Eagleton. The Parks, Recreation and Renewable Resources Subcommittee held a hearing on May 1, 1979.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTES

The Senate Committee on Energy and Natural Resources in open business session on May 15, 1979, by unanimous vote of a quorum present recommends that the Senate pass S. 490, if amended as described herein.

COMMITTEE AMENDMENTS

During consideration of S. 490, the Committee adopted an amendment in the nature of a substitute. While the majority of the changes in the substitute text constitute technical changes, the following is a discussion of those provisions that differ from S. 490, as introduced.

The Committee deleted possession as a prohibited act. Current holders of archaeological resources obtained before the effective date of this Act may own, possess, buy, sell, trade or exchange archaeological resources without violating this Act. In other words, after enactment of this legislation a person may own, possess, buy, sell, trade or exchange archaeological artifacts if held prior to enactment regardless of origin or proof of ownership, and not be subject to any penalty under this Act, unless the archaeological resource was excavated or removed in violation of any other Federal or State law.

As introduced, S. 490 contained a separate Indian section which would direct the Secretary of the Interior to study all aspects of excavation of archaeological resources from Indian lands. Other provisions also contained in that section were retained in the bill, as amended.

As the bill was amended, what formerly constituted a separate distinct Indian section of the legislation would now be incorporated throughout the provisions of the bill. This change is reflected in the amended title which would read, "A bill to protect archaeological resources on public lands and Indian land, and for other purposes".

The following additional provisions dealing specifically with Indians were adopted by the Committee in the substitute text:

Section 4(c) recognizes that certain locations outside of Indian lands may be of religious significance to an existing tribe. The Secretary of the Interior would make such determination prior to issuing a permit. In compliance with the American Indian Religious Freedom Act (92 Stat. 469, 42 U.S.C. 1996), the Committee believes that this precaution should be taken by the Secretary to ensure that sites of religious significance are protected from those seeking permits to excavate.

Section 4(g)(1) provides that no permit would be required by any Indian tribe or member of such tribe to excavate archaeological resources on the lands occupied by such tribe provided that the existing tribal law monitors such activity. Should a tribe not have laws regulating archaeological activities, then the provision of S. 490, as amended, would apply.

Section 4(g)(2) provides that permits to excavate on Indian lands may only be granted at the consent of the affected Indian or Indian tribe, and such consent may include additional terms requested by such Indian or Indian tribe.

Section 9(c) would return artifacts and make payments of damages to an Indian or Indian tribe for archaeological resources taken from Indian Lands. This provision would allow partial or full restoration of a site or area as well as the return of all archaeological resources.

The Committee adopted a civil penalties section based on existing procedures in the Endangered Species Act. This section would give the Federal land manager "ticket writing" authority for minor offenses which do not involve a knowing violation of the prohibitions in the act. The Committee agreed that enforcement authority which did not involve the stigma of a criminal violation would be useful to the Federal land manager as a deterrent for illegal activities and for users of the public lands who might unknowingly violate the act.

A person assessed a civil penalty under this section would be afforded full due process rights of notice and a hearing to contest the penalty before an administrative law judge and judicial review of administrative decision. The Committee is aware that there may exist potential for abuse of this citation authority.

The Committee recognizes the difficulties associated with adopting civil penalties for the enforcement of provisions of this Act. The Members expressed concern that the protection of individuals afforded by the presumption of innocence could be eroded by an arbitrary or excessive administrative application of civil penalties in contested situations.

However, the Committee believes it is necessary to provide Federal land managers with a variety of enforcement measures appropriate to the situations encountered in the field.

The Committee cautions that civil penalties should be sparingly used, and then only in situations which clearly warrant an enforcement action and not to harass citizens in normal use of public lands or who inadvertently infringe on regulations in minor ways.

In addition, the Committee modified the original penalties section of S. 490 by providing for a misdemeanor penalty for violations involving archaeological resources with a value of less than $5,000. Felony prosecutions would therefore be limited to major violations of the act.

The Committee retained language in the criminal section which would make violations under this Act general intent crimes rather than specific intent crimes.

The Committee understands that federal land managers have general authority under existing regulations to issue citations for petty misdemeanors for a variety of offenses, including those encompassed by this legislation. The reported bill does not affect this existing authority.

The Committee urges federal land managers to publish the appropriate prohibitions and warnings in their respective brochures, maps, visitor guides, and to post signs at entrances to public lands. The Committee does not intend that specific sites be signed, rather general

signing should be done at popular access points to public lands. The Committee feels that the education of the visitor, may, in the long run, reduce the number of incidents on public lands.

The Committee felt that S. 490, as introduced, did not adequately deal with the cost of restoring the resources and/or the sites on public lands or Indian lands which have suffered significant damage through illegal activities. Therefore, section 8 of the Committee amendment would also make violators of the prohibitions contained in section 6 liable to the United States for the archaeological value of the resource lost through an illegal activity, the commercial value of the resource, and the cost of restoration of the site.

Section 9(a) (b) and (c) were changed to direct the Secretary of the Treasury to pay rewards from penalties and fines collected under Section 7. The reward payments would be a direct function, not subject to appropriations, and would come from fines collected under the act.

The Committee reduced the maximum amount payable as a reward to discourage frivolous allegations aimed at obtaining a large reward. The $500.00 figure was arrived at as a just, compensatory amount for time and troubles incurred by persons furnishing information leading to a finding of civil violation or the conviction of criminal violation.

Further, Section 9 of S. 490, as amended, modifies the original language to provide that the court or the administrative law judge has discretion to decide whether vehicles or equipment used illegally to remove or destroy archaeological sites or cultural resources should be forfeited to the United States or to an Indian or Indian tribe as the case may be.

By providing such discretion, it is the Committee's understanding that those who unknowingly or unwillingly have their vehicle or equipment used in an illegal activity would be protected against their loss by forfeiture.

In clarifying the intent regarding the possession of cultural resources the Committee adopted a new section 5 which provides that those establishments or agencies that maintain exhibition artifacts should be able, as they have in the past, to exchange their cultural resources with other establishments or agencies for the scientific and educational benefit of the public.

Section 5 also authorizes the Secretary of the Interior to promulgate regulation which would provide for the ultimate disposition of resources recovered pursuant to the Act of June 27, 1960 (16 U.S.C. 469–469c) or the Act of June 8, 1906 (16 U.S.C. 431–433). Such regulations would govern the disposition of resources acquired pursuant to S. 490, as amended.

Section 11 of S. 490, as amended, modifies the regulations section of the measure as introduced. The original provision would have required the Secretary of the Interior, in consultation with any other Secretary having primary authority for the management of lands affected by this Act, to promulgate regulations to carry out the purposes of this act.

The Committee amendment would require the Secretaries of the Interior, Agriculture, and Defense, whose land managing responsibilities incorporate the majority of lands affected by this legislation, to promulgate uniform rules and regulations. It was felt that the uniform

regulation approach would afford each of those major departments equal input into rules and regulations under which they all must ultimately comply.

It is the intent of the Committee that the uniform regulations be developed as expeditiously as possible. However, it should be noted that basic agreement should be reached among the departments prior to publication of proposed uniform regulations by any one department.

Section 12 makes it clear that this Act does not impose any additional permitting system for collection of rocks or minerals which are not archaeological resources. Other acts which provide for archaeological review, mitigation, and salvage provide protection before, during, and after these other activities.

COST AND BUDGETARY CONSIDERATIONS

S. 490, as amended by the Committee, contains no authorization. The only cost which would be associated with the passage of this legislation would be administrative expenses incurred through the enforcement and administration of the civil procedures within the affected Federal land managing agencies, and through the promulgation of regulations.

The following estimate of costs of this measure has been provided by the Congressional Budget Office.

CONGRESSIONAL BUDGET OFFICE,
U.S. CONGRESS,
Washington, D.C., May 15, 1979.

HON. HENRY M. JACKSON,
Chairman, Committee on Energy and Natural Resources, U.S. Senate,
Dirksen Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 490, the Archaeological Resources Protection Act of 1979, as ordered reported by the Senate Committee on Energy and Natural Resources, May 15, 1979.

The bill provides for the protection of archaeological resources on public and Indian lands by prohibiting unauthorized removal or sale of antiquities and outlines a means of assessing penalties to be imposed on violators. Costs incurred by the federal government as a result of enactment of this bill will stem from enforcement and admniistration of the civil penalty process, promulgation of regulations, and the review of applications. Based on information available from the Department of the Interior, it is estimated that these costs will total approximately $4 million for fiscal years 1980 through 1984.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

ALICE M. RIVLIN, *Director*,

REGULATORY IMPACT STATEMENT

In compliance with paragraph 5 of the Rule XXIX of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out S. 490.

This bill is not a regulatory measure in the sense of imposing Government established standards or significant economic responsibilities on private individuals and business.

While some personal information may be required on permit applications developed pursuant to regulations promulgated under this Act for access to the public lands for archaeological research purposes, there would be little impact on personal privacy. A minimum of additional paperwork would result from the enactment of S. 490, as ordered reported.

EXECUTIVE COMMUNICATIONS

The pertinent legislative reports and communications received by the Committee from the Office of Management and Budget and from the Department of the Interior setting forth executive agency recommendations relating to S. 490 are set forth below:

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., April 26, 1979.

HON. HENRY M. JACKSON,
Chairman, Committee on Energy and Natural Resources, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This responds to the request of your Committee for the views of this Department on S. 490, a bill to protect archaeological resources owned by the United States, and for other purposes.

We recommend that S. 490 be enacted if it is amended as described herein.

S. 490 would supplement our authorization to control archaeological excavations on Federally owned or controlled lands, and to remove objects of antiquity from such lands for scholarly purposes. In general, the bill will solve a number of problems in present authorizations and will provide much greater protection of the archaeological resources of the United States.

Specifically, S. 490 would: (1) be of broader application than the Antiquities Act by allowing the archaeological permits to be issued to any qualified individual or private entity as well as any officer, employee, agent, department or instrumentality of the United States or a State or political subdivision thereof: (2) define "archaeological resource" as any material remains of past human life or activities which are at least 50 years of age and of archaeological interest; (3) set forth certain qualifications to be met by permit applications and the conditions under which the appropriate Secretary could either refuse to issue a permit or suspend or revoke issued permits; (4) prohibit commercial trade in archaeological resources obtained in violation of Federal, State or local laws; (5) authorize the appropriate Secretary to assess civil penalties, subject to judicial review, for violations of the prohibitions contained in the bill or regulations or permits; (6) provide greatly increased criminal penalties for violations of the prohibitions contained in the bill (up to $20,000 fine or two years imprisonment, or both, for a first offense and up to $100,000 fine or five years imprisonment, or both, for second and subsequent offenses versus a maximum $500 fine or 90 days imprisonment, or both, for violations

of the 1906 Act); (7) authorize the appropriate Secretary to recommend the payment of up to ½ of any fine or civil penalty, but not more than $2,500, to any person furnishing information leading to the finding of a civil violation or criminal conviction; (8) direct the Secretary of the Interior to report to the Congress by June 1, 1980, on the regulation of the excavation and removal of archaeological resources from Indian lands; (9) provide a specific exemption from the Freedom of Information Act for site location information concerning archaeological resources covered by the bill, unless the appropriate Secretary found the disclosure of this information would further the purposes of the bill and not create risk of harm to the resources or the site location; (10) authorize the Secretary of the Interior, after consultation with other land management departments, to promulgate the rules and regulations to be followed by all such departments in carrying out the purposes of the bill; and (11) require the Secretary of the Interior to report annually to the Congress on the activities carried out by him under the bill.

This Administration wholeheartedly endorses the purposes of S. 490. In recent years, the Antiquities Act of 1906, 16 U.S.C. 431–433, has had the application of its criminal sanctions severely circumscribed. The result has been a corresponding decrease in the effectiveness of its protection of archaeological resources on Federal lands. The most severe problem is the holding in *United States* v. *Diaz*, 499 F.2d 113 (9th Cir. 1974), that the criminal penalty provisions of the Antiquities Act are unconstitutionally vague. Another problem is that in light of the increased commercial trade in archaeological treasures, the penalties provided in the Act are insufficient to provide the deterrent effect necessary to protect these resources. Finally, we have found it increasingly a problem that information on permit applications and other cultural resource information, particularly relating to site location, must be released under the Freedom of Information Act leading to an increased threat of vandalism of archaeological sites.

This bill reflects the need demonstrated by these problems for a new comprehensive statute to deal with each of these issues. It provides a much clearer direction as to what resources Congress intends to be protected, and specifically grants to the Secretary of the Interior regulatory authority to further define those resources. This would overcome the vagueness problem of *Diaz*. It also provides for a full range of enforcement tools running from civil penalties to felony provisions for particularly serious offenses. An additional facet is that it makes criminal the commercial trade in archaeological resources which were obtained in violation of either Federal, State, or local law. While recognizing that the problem of proof of how the object was initially obtained is a difficult one, we support this additional layer of protection for the valuable resources which would be protected by this bill. These two aspects of the bill would significantly improve the effectiveness of the cultural resources protection program of this Department.

Finally, the bill would provide a specific exemption from the Freedom of Information Act for site location information regarding archaeological resources covered by the bill, unless the Secretary finds that the release of such information would further the purposes of the bill and would not create a risk of harm to such resources or the site in

which they are located. While this provision would be a positive step, we would suggest that it is unnecessary and, probably unintentionally, limited. Because the only archaeological resources covered are those on Federal land, where, in the course of cultural resource surveys or other activities required by other laws, information is collected regarding sites not on Federal land, it would not be exempted from release. We believe that this provision should be redrafted to protect information relating to any archaeological site.

We strongly support the overall purposes of S. 490. We would like to recommend, however, a number of amendments to the bill which will eliminate certain problems of language, interpretation and administration. If so amended, we recommend the enactment of S. 490. Our proposed amendments are attached to this report.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

ROBERT HERBST,
Secretary.

Enclosure.

SUGGESTED AMENDMENTS TO S. 490

1. Sec. 2(a)(2), page 2: On line 6, after "resources" insert "which are the property of the United States".

Reason: We believe the bill should make it clear that these archaeological resources are in public ownership.

2. Sec. 3(1), page 2: Delete paragraph (1) and insert the following new paragraph:

"(1) The term "archaeological resource" means any material remains of past human life or activities which are at least fifty years of age and which are of archaeological interest, as determined under regulations promulgated by the Secretary of the Interior. The Secretary of the Interior shall promulgate regulations under this paragraph after consultation with other Federal land managers, the professional archaeological community, representatives of concerned States and all other interested parties."

Reason: This change will eliminate a partial listing of archaeological resources, which may be confusing. Instead, this can be handled through regulations.

3. Sec. 3(2), page 3: Delete lines 13–21 and insert:

"(2) The term "Secretary" means, except where otherwise specifically provided, the Secretary of the Department or the head of any agency of the United States (as defined by section 551 of Title 5, U.S.C.) having primary management authority over the land concerned."

Reason: We believe this clarifies the intent of the definition and will also clarify the provisions of the bill where the term is used.

4. Sec. 3(3), page 3: Delete all of section 3(3), and insert the following:

"The term 'Indian lands' means lands of Indian tribes or Indian individuals which are either held in trust by the United States or subject to a restriction against alienation imposed by the United States."

Reason: The term "Indian lands" is defined to include all lands within the exterior boundaries of any Federal Indian reservation. This may be somewhat broader than is intended for there are situations in which either private or State owned lands may be included within these boundaries. Also, lands are often held in trust for individuals. The intent of this bill seemingly would be achieved by defining "Indian lands" as suggested.

5. Sec. 3(4), page 4, line 2: Between "trust," and "association", insert "institution,".

Reason: Technical amendment.

6. Sec. 3(5), page 4: Add new subparagraph (5) as follows:

"An archaeological survey means a physical inspection, inventory, and/or assessment which has the potential for physically impacting archaeological resources located within a prescribed geographical area."

Reason: Required to further explain terminology in reference to Sections 4 and 8.

7. Sec. 3(6), page 4: Insert a new subparagraph (6) as follows:

"(6) The term "States" means any of the fifty States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands."

Reason: The term "State", which appears several places in the bill, needs to be defined to clarify the application of this bill to land areas which are not strictly States.

8. Sec. 4 page 4: Section 4 of H.R. 1825 should be revised as indicated below. We have completely rewritten this section:

"Excavation and Removal from Federal land—(a) Any person may apply to the Secretary for a permit for archaeological survey, excavation, or removal of any archaeological resources located on land owned or controlled by the United States or to carry out any or all such activities.

(b) A permit may only be issued pursuant to an application under subsection (a) permitting archaeological surveys, excavation, or removal of any archaeological resource, or permitting any or all such activities, if the Secretary to whom such application is made determines, under regulations promulgated by the Secretary of the Interior, that

(1) the research is important to the acquisition of data related to significant archaeological concerns, and

(2) capability exists to recover, analyze, synthesize or disseminate the results of the work; to meet curatorial responsibilities for the archaeological materials and resources removed; and to provide for appropriate preservation measures onsite, and

(3) a work plan is submitted meeting current professional standards (including necessary logistical, financial and project management data) which demonstrates the applicant and principal investigator have sufficient experience and capability to complete the work in accordance with purposes of this Act.

Such permit shall contain such terms and conditions as the Secretary concerned deems necessary (pursuant to regulations promulgated by the Secretary of the Interior) to carry out the

purposes of this Act, to insure compliance with other applicable provisions of law, and to protect other resources involved. The Secretary of the Interior shall promulgate interim regulations within 90 days of the passage of this Act and shall promulgate final regulations within one year of the passage of this Act. Promulgation of final regulations under this subsection will occur only after consultation with—

(1) other departments, bureaus, and agencies of the United States having primary responsibility for management of land owned or controlled by the United States, and

(2) representatives of concerned State agencies.

(c) Systematic collections of archaeological resources and related physical and scientific evidences, archaeological resources with inherent data potential, and associated documentation shall be retained in a manner to assure their scientific integrity. The United States shall retain a proprietary interest in such collections and their conservation for public benefit.

(d) The Secretary to whom an application is made under subsection (a) may refuse to issue a permit under this section to any applicant—

(1) against whom a civil penalty has been assessed under section 6(a) or

(2) who has been convicted of a violation under sections 6(b) or 6(c) or under the Act of June 8, 1906 (34 Stat. 225; 16 U.S.C. 431–433).

Any permit issued under this section may be suspended by the Secretary to whom an application is made for not more than two years for each instance that he determines that the permittee has violated the terms of the permit or the prohibition contained in section 5. Any such permit may be revoked by such Secretary upon assessment of a civil penalty under section 6(a) against the permittee or upon the permittee's conviction of a violation under section 6(b) or 6(c).

(e) No permit or other permission shall be required under the Act of June 8, 1906 (34 Stat. 225, 16 U.S.C. 431–433) for any activity for which a permit is issued under this section. Nothing in this Act shall modify or affect any existing permit validly issued under the Act of June 8, 1906.

(f) Nothing contained in this section shall require any officer, employee, agent, department or instrumentality of the United States with land management responsibilities to acquire a permit to survey, excavate or remove archaeological resources, provided such activities are a part of the authorized duties of such officer, employee, agent, department or instrumentality of the United States, are undertaken with the consent of the land management agency, and are carried out in accordance with the purposes and intent of this Act, and in accordance with other applicable laws.

(g) Issuance of a permit in accordance with this section and applicable regulations shall not require compliance with section 106 of the Act of October 15, 1966 (80 Stat. 917, 16 U.S.C. 470f).

(h) The responsibilities and duties under this Act of any Secretary may, with the consent of the Secretary of the Interior, be delegated to the Secretary of the Interior.

Reason: These recommendations are designed to clarify the policy of the Act by recognizing that archaeological resources are a diminishing resource in this nation today. Archaeological excavation is itself a process of study that destroys the resource. Because of this, and because archaeological resources are finite and non-renewable, the objective should be to manage these resources for their long-term conservation while at the same time allowing the necessary consumption of them in the interests of advancing knowledge about the past or to illustrate or interpret to the public the human history of this nation. The purpose of the recommended changes in this section is to strike a balance between this generation's consumption of the archaeological resources on Federal lands and the conservation of these resources for future generations when new research problems and advanced research methods of a less destructive nature will be available.

Four additional provisions are recommended for inclusion: (1) to continue in force existing Antiquities Act permits issued under section 3 of the Antiquities Act of 1906; (2) language to clarify that any employee or agent of the Federal government does not need a permit under this act, provided the employee or agent is carrying out authorized, agency-related duties, in accordance with other applicable laws, such as the Archeological and Historic Preservation Act of 1974 and the Historic Preservation Act of 1966; (3) that compliance with the permitting provision of this act would excuse compliance with section 106 of the National Historic Preservation Act of 1966; and (4) authorization for any Secretary to delegate to the Secretary of the Interior, where he consents, the authority to issue permits under this act.

9. Sec. 5(a), page 6: Delete line 10, and insert in lieu thereof:

"SEC. 5. (a) Except as provided in section 4(f), no person may excavate, remove, injure or destroy any ar-"

Reason: Technical amendment to make the language of this section consistent with 16 U.S.C. 433, and to clarify the relationship of this prohibition to the disclaimer in section 4(f).

10. Sec. 5(b), page 6, line 18, and sec. 5(c), page 7, line 2: Delete "possess,"

Reason: there are Constitutional problems inherent in making the possession of an object a criminal offense in light of the effective date provisions in (d)(2). The deprivation of property and due process clauses require that in such a situation the criminal offense be tied to an intervennig act. The way the bill is presently drafted, a person possessing an object legally the day before the bill was passed could be put into criminal violation the day the bill became effective. The simplest remedy is to delete possession as a crime. Insofar as overall enforcement is concerned, this deletion does not seem to weaken the bill significantly.

11. Sec. 5(b)(2), page 6: Reword paragraph (2) on lines 22–24 to read as follows: "any other Federal law, rule, regulation, or permit."

Reason: Technical amendment.

12. Sec. 5(c) and (d)(2), page 7: Following the word "any" on line 5, reword as follows, "State or local law, ordinance, rule, regulation, or permit." On line 15, following the word "any", reword to read "State or local law, ordinance, rule, regulation, or permit or of any other Federal law before, on or after the date of the enactment of the Act."

Reason: Technical amendment.

13. Sec. 6(a)(2), page 8, lines 3–14: We believe that the Congress should set an upper limit on the penalty which may be provided by the Secretary of the Interior. This is the clearest way for the Secretary to establish a system of penalties which most closely reflects the will of the Congress and which therefore, would withstand judicial review as reasonable. Failure to establish such a ceiling may well result in any system of penalties succumbing to judicial challenge. We feel that under the bill as drafted the Secretary could not impose a civil penalty higher than $20,000, since the maximum fine provided in section 6(b) is $20,000. Because of the extreme value of the properties involved, we believe that both of these figures should be raised to more adequately provide the deterrent we need.

14. Sec. 6(a)(2), page 8, lines 4 and 10: Delete the word "guidelines" and insert the word "regulations" in lieu thereof.

Reason: Technical amendment.

15. Sec. 6(a)(2), page 8, line 12: Change the word "shall" to "may".

Reason: To provide additional flexibility in the penalty assessment process.

16. Sec. 6(a)(3): In lines 17–18, delete "Court of Appeals for the District of Columbia Circuit or for any other circuit in". Insert in lieu thereof "District Court for the District of Columbia or for any other district in".

Reason: Review of the assessments of civil penalties is well within the province of the District Courts. To allocate the function to the already crowded Circuit Court calendars will only further delay resolution of the civil penalty assessment. Additionally, to require a person against whom a civil penalty has been assessed to seek his relief in the Circuit Court may well discharge meritorious appeals because of the distance to the courts and the expense involved.

17. Sec. 6(a)(4)(A) and (B), page 9: Section 6(a)(4)(A) and (B) should refer to paragraph (3) instead of paragraph (2).

Reason: Technical amendment.

18. Sec. 6(c), page 9: Delete all of lines 17–20 and insert in lieu thereof:

"(c) Any person who commits a second or subsequent violation of any prohibition contained in section 5"

Reason: Technical amendment.

19. Sec. 7(a), page 9: In line 24, delete the word "recommendation", and insert in lieu thereof the word "certification".

Reason: Technical amendment. The Department of Treasury indicates that it needs a certification and not just a recommendation.

20. Sec. 7(a), page 10: After line 10, insert this sentence:

"There are hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of this subsection."

Reason: Without this amendment, funds from a fined person would go to the general fund of Treasury. This amendment would put the money raised from fines into an account for that purpose, so that rewards could be paid out of that account.

21. Sec. 7(a), page 10, line 6: Change the word "shall" to "may" and delete the word "equally".

Reason: To allow the Secretary to provide for a division among persons which reflects the value of their contribution to the enforcement effort.

22. Sec. 7(b)(1), page 10, line 17: Insert "or (c)" between "6(b)" and ",".

Reason: Technical amendment.

23. Sec. 8, page 10: Throughout sec. 8 of the bill, insert after "Secretary" the words "of the Interior".

Reason: Technical amendment.

24. Sec. 8(a), page 11, line 5: Delete the words "proposed legislation designed to allow" and insert the words "consideration of the feasibility of authorizing".

Reason: This amendment gives the Secretary discretion in the study process and does not prejudice the outcome of the study.

25. Sec. 8(b), page 11, line 10: Delete the words "drafts of proposed legislation and".

Reason: Same reason as in amendment number 24 above.

26. Sec. 8(b), page 11, line 12: Delete "1980" and insert "1982".

Reason: We believe the Indian lands study required by this section will require an additional two years than allowed by the bill.

27. Sec. 8(c), page 11, line 13: Delete "After the date of the enactment of this Act", and after "all", insert "archaeological surveys".

Reason: All such archaeological resources are presently protected by the Antiquities Act. This subsection's design is to reinforce in clear language that during the interim time prior to the Secretary's report to Congress, such lands shall continue to receive equal protection under this statute when enacted.

28. Sec. 8(d), page 11, lines 16–19: Delete all of section 8(d) and insert in lieu thereof the following:

> "The Secretary shall not issue a permit under this Act with respect to Indian lands if the Indian tribe objects to such issuance and such objections are consistent with section 202 of the Civil Rights Act of 1968 (82 Stat. 77). With respect to permits issued under this Act with respect to Indian lands, the Secretary shall include and enforce terms and conditions in addition to those required by this Act as may be requested by the Indian tribe, consistent with section 202 of the Civil Rights Act of 1968 and other statutory responsibilities."

Reason: This amendment requires the tribes' objections to be consistent with section 202 of he Civil Rights Act of 1968. In addition, the terms and conditions requested by a tribe should not be inconsistent with other statutory requirements imposed on the Secretary.

29. Sec. 9, page 12: Delete all of lines 5–8, and insert the following:

> "SEC. 9. Information obtained by the Federal government under this Act or under any other provision of Federal law concerning the location of any archaeological resource may not be made."

Reason: We believe that in order to protect archaeological resources site location information regarding any archaeological resources obtained by the government under any law should not be disclosed unless the proper finding is made.

30. Sec. 9(1), page 12: In line 13, delete "this" and insert in its place "the relevant".

Reason: Technical amendment.

31. Sec. 11(a), page 13, line 5: Delete existing line 5, and substitute "repeal or modify".

Reason: We would suggest that section 11(a), as introduced, might preclude any cultural resource protection under this bill in the con-

text of mining or mineral leasing. To remove such protection completely seems unnecessary. The provisions of the mining and mineral leasing laws can be preserved from modification or repeal, while at the same time giving a reasonable level of protection to cultural resources which might otherwise be endangered.

32. Add new section 11(c) as follows:

"(c) A permit under this Act shall not be required when an archaeological survey in compliance with section 106 of the National Historic Preservation Act of 1966 has been made and it has been determined that the subject project will not adversely affect archaeological resources. However, this shall not be deemed to exempt an agency from compliance with this act or the Archaeological and Historic Preservation Act of 1974 when new or additional archaeological resources are discovered."

Reason: To protect private contractors from criminal liability in the event of an inadvertant discovery and/or destruction of an archaeological resource, after there has been agency compliance with section 106.

33. Sec. 12, page 13, lines 13 and 14: Delete the words "annually, submit" and insert in lieu thereof the words "as a part of the annual report submitted to the Congress pursuant to section 5(c) of the Archaeology and Historic Preservation Act of 1974 (74 Stat. 220) as amended,".

Reason: We believe a separate report to the Congress should not be required under this bill since an archaeology report is already being submitted annually to the Congress under the 1974 Act, and the reports can easily be consolidated.

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C., May 8, 1979.

Hon. HENRY M. JACKSON,
Chairman, Committee on Energy and Natural Resources,
U.S. Senate,
New Senate Office Building,
Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request of March 23, 1979, for the views of the Office of Management and Budget on S. 490, the "Archaeological Resources Protection Act of 1979."

The Office of Management and Budget would have no objection to the enactment of S. 490 if amended as recommended by the Department of the Interior in its letter to you, dated April 26, 1979.

Sincerely,

JAMES M. FREY,
Assistant Director for
Legislative Reference.

CHANGES IN EXISTING LAW

In compliance with subsection (4) of Rule XXIX of the Standing Rules of the Senate, the Committee notes that no changes in existing law are made by the bill S. 490 as reported.

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